

## POLITICAL.

OPINION OF THE ATTORNEY GENERAL in relation to the power of the Circuit Court for the District of Columbia to issue a *Mandamus* to compel the Postmaster General to credit Messrs. Stockton and Stokes with a certain sum of money.

[CONCLUDED.]

It is true that the act of the 27th of February, 1801, was passed fourteen days after the enactment of the law changing the Judiciary, and establishing new Circuit Courts of the United States, and that it gave a more extensive jurisdiction than the 11th section of the act of 1789; but it is scarcely correct to speak of those Courts as in existence on the 27th of February, 1801. The law creating them was passed on the 13th of February, and the nominations were made and acted on between that day and the third of March, 1801; but no one of the Courts was organized, and probably no one of the judges actually in office on the 27th of February. This, however, is not very important, because the third section of the act of the 27th of February, 1801, concerning this District, contains no specific reference to the act of 13th of February, but merely says "that the said Court, and the judges thereof, shall have all the powers vested in the Circuit Courts, and the judges of the Circuit Courts of the U. S. States." The object of this section evidently was to define the general powers of the Court, and not to enter into the details rendered necessary by the peculiar condition of the District, which was done in the fifth section. Its general powers, and the general powers of its judges were to be the same with those of the Circuit Courts, and the judges of the Circuit Courts of the United States, so as defined in any particular law, but as they should, from time to time, be vested by law in those Courts and judges. This, it seems to me, is the plain meaning of the clause. Consequently, although so long as the act of 1801, remained in force, its provisions formed the measure of the general powers of the Circuit Court of this District; yet when it was repealed, and the old provisions of the act of 1789 substituted in its place, those substituted provisions became thenceforward the measure of its general powers. This is the general rule of interpretation in such cases, because it is not to be presumed, unless the contrary be expressly declared, that the repealed law shall remain in force, in respect to any of several cases standing on the same ground, and thus produce an unnecessary and anomalous distinction. This rule is especially applicable to the present case. The act of the 8th of March, 1802, repeals the acts of the 13th of February, and the third of March, 1801, from and after the first day of July then next, and contains no exception whatever of the Court established in this District. The 3d section expressly declares "that all the acts, and parts of acts, which were in force before the passage of the aforesaid two acts, and which, by the same, were either amended, explained, altered, or repealed, shall be, and hereby are, after the said first day of July next, revived, and as full and complete force and operation, as if the said two acts had never been made." Under these circumstances, it seems to me impossible to derive any power from the act of the 13th of February, 1801; and I shall therefore omit any reference to the particular provisions of that law.

4. I do this, rather, because, in my judgment, neither the provisions of that law, nor suggesting them to be in force, nor those of any other law that has been, or can be passed, under our present Constitution, however broad they may be in their terms, can confer on any Court of the United States, the power to supervise and control the action of an executive officer of the United States in any official matter, properly appropriating to the executive department in which he is employed.

In my former communication, I did not deem it needful to enter into the exposition of this part of the case. The two decisions of the Supreme Court to which I referred, seemed sufficient for my purpose, and for obvious reasons connected with the history of the case of *Marbury vs. Madison*, I purposely refrained from any allusion to that case. The claim of jurisdiction now made by the Circuit Court, and the course of reasoning by which it is supported, involving as they do an assertion of power to direct not only the Postmaster General, but every other executive officer residing within the District, in the performance of his official duties when they are supposed to affect the legal rights of an individual, compel me to explain the constitutional grounds upon which this part of my opinion is founded.

The proceedings of the convention which framed the Constitution, abundantly prove the earnest desire of its authors to separate the three great departments, the Legislative, Executive, and Judicial from each other, and to render each independent of the other two. This general object was accomplished, with a few specified exceptions, by the actual provisions of the Constitution. It declares that "the executive power shall be vested in a President of the United States." In accordance with this fundamental arrangement, it subsequently provides that the President "shall take care that the laws be faithfully executed." As a means to the performance of this duty, it gives to the President the exclusive power of appointing, and with the advice and consent of the Senate, the principal officers in the Executive Departments; it authorizes him to require from them their opinions in writing, "upon any subject relating to the duties of their respective offices;" it secures the appointment of inferior executive officers to the President alone, or to the heads of Departments, as Congress shall by law direct; and according to a construction coeval with the existence of the Government, and settled on the fullest deliberation, it also secures to the President the power of removing at pleasure, either by his own act or through the agency of the heads of the Departments, every officer employed therein.

The obvious design of all these provisions was to make the President responsible for the faithful execution of the laws, and for the official acts of all the officers of the Executive Department. Not that he should be liable to impeachment, or other criminal procedure, or to a civil action, for every illegal act or culpable omission of each one of those officers. Their great number, the distance of many of them from the seat of Government, and the multifarious character of their duties, render it impossible for any one man to give such attention to their conduct as to become responsible for a constitution or otherwise, never requires impossibilities. Nor that the inferior officer should be exempt from personal responsibility by impeachment, indictment, or civil action, for any culpable act or omission of duty, even though he may be able to plead in his excuse the express direction of the President. But it is possible for the President through the executive departments, to give more or less attention to the proceedings of each department, and to take care that the laws concerning them be faithfully executed; and it is agreeable to reason and to the rules of law, that where two persons unite in the performance of an illegal act, or in a culpable omission of duty, each to a greater or less extent, and according to the circumstances of the case, should be personally responsible, although one of them may have an official superiority to the other. This species of responsibility it was the design of the Constitution to fasten upon the President; and hence it vests in him, and in him alone, with a few specified exceptions, the whole executive power of the Government. It is true that, within a few years, the doctrine has been advanced, that when the Constitution says "the executive power shall be vested in a President of the United States," it merely intends to give a name to the department and not to grant any executive power; and that, on this ground, efforts have been made to prove that the President alone does not possess the power of removal; but it is also true, that this doctrine is directly opposed to the natural import of the language used; to the principles on which the power of removal was established by the first Congress; to the expostulations then and since given by the ablest expounders of the Constitution; and to the actual course of the Government, acquiesced in by all its branches, during the whole period of its existence.

The system thus ordained by the Constitution, whatever diversity of opinion may have existed, or may yet exist, as to its expediency, cannot be varied or interdicted with

by the Legislature or the Judiciary. It belongs to the Legislature to create the executive departments, to define their powers and duties, to provide the requisite officers, to prescribe their various functions, and to make all other legal provisions which may be necessary and proper to regulate the action of those departments. But when a law is once passed for the government of the executive officer, all that appertains to its execution falls under the care of the President. It is his province to instruct and command the officer; to remove him if he acts unlawfully; and to appoint one in his place who will fulfil his duty agreeably to law. No other department of the Government can exercise this power of removal; the Legislature cannot do it; nor can they devolve it on the Judiciary; nor can those two departments combined take it from the President.

It results from the foregoing principles, that the writ of *mandamus* cannot be issued by any Court of the United States to any officer, whether principal or inferior, of an executive department, for the purpose of commanding the execution of any law concerning the appropriate executive duties of such officer. This conclusion will be strengthened by a little attention to the history and nature of the writ. From an early period, it has been used by the English Court of King's Bench, as a means of enforcing its general supervisory jurisdiction over courts, magistrates, and ministerial officers inferior to that tribunal. By the statute of 9 Ann. c. 20, and 11 George I. c. 4, it was so extended as to afford a remedy for persons entitled to offices, or places in corporations, and to compel elections and correct abuses therein, of corporate officers; but we find no instance of its being directed to any officer of the executive departments. In England, it issues from the King's Bench alone, because in that Court the King originally sat in person, and by fiction of law is yet supposed to do so; and because the authority to control the inferior jurisdictions is one of his regal prerogatives. It is, therefore, denominated by Blackstone and other writers "a high prerogative writ;" and if the judge or officer to whom it shall be directed in its peremptory form, fails to obey it, he is punishable for his contempt by attachment. During the Colonial Government, this branch of the King's prerogative extended to the colonies, and was executed through those colonial courts which were invested with a jurisdiction analogous to that of the King's Bench, and from them the jurisdiction has been derived to the State courts which succeeded them.

Under the 14th section of the judiciary act of 1789, the Supreme Court, in aid of its appellate jurisdiction, may issue this writ in all cases where any act necessary to the exercise of that jurisdiction shall be omitted to be performed by an inferior tribunal or officer; and the Circuit Courts of the United States may issue it in like cases. In these instances, the original design of the writ is plainly kept up; the tribunals or officers to which it is issued are subordinate to the appellate court, which, in these respects, exercises over them a supervisory jurisdiction.

The writ, then, necessarily implies a supervisory power in the court which issues it, over the tribunal or officer to which it is directed. In the cases mentioned such a power exists; but under the Constitution of the United States, it has not been given to, and cannot exist in, any of our courts over the executive departments.

The existence of such a power in the Judiciary is repugnant to the whole theory of the Constitution: its effectual exertion, if it were practicable, would defeat the President's power of removals, would take away his responsibility for the faithful execution of the laws—and would transfer to the Judiciary, in the particular case, the whole executive power: for it is palpable, that if the President, under the belief that the faithful execution of the law will be best secured by not doing a particular thing which is demanded by a third party, so directs the executive officer, and the Court, on the application of such party, issues a *mandamus* commanding it to be done, and the writ is obeyed, it is the Court, and not the President, that exercises the executive power; and the distribution of powers, so carefully fixed by the Constitution, is unset and overturned. But its effectual exertion is not practicable; because the President's power of removal cannot be restrained, and by its exercise he can readily defeat any command which the Judiciary may address to the executive officer. To illustrate this, let us suppose that the Circuit Court of this District issue a peremptory *mandamus* to the head of any one of the departments, commanding him to execute any particular law concerning his official duties, in a given way; and that the officer refuses obedience, and is attached and committed for contempt. This is the end of the judicial power in a case of *mandamus*; but suppose at this stage of the proceedings the President interferes by removing the officer, and appointing a successor; what then becomes of the judicial remedy? The act can only be performed by a person holding the office; the individual in the custody of the court no longer holds that office; it has been legally taken from him; and if he were ever so willing to perform the act, he has no longer the ability to do so. The proceeding must then be abandoned, or commenced *de novo* against the new officer, to be frustrated, if the President thinks proper, at the same stage as often as the court shall reach it.—If it be said that this is supposing an extreme case, and that the President, from respect to the Judiciary, would probably suffer the officer to obey the *mandamus*, rather than so exercise the constitutional power of removal; the answer is, that the very existence of such a power, whether it be used or not, is fatal to the claim of jurisdiction; and that cases may easily be supposed, in which the President, with the strongest desire to avoid a conflict with the Judiciary, may yet have no alternative but to use it.

In cases which properly refer themselves to the Judiciary, it is rarely or never possible to defeat, in this way, the ultimate execution of the judgment of the court. And the fact, that without the consent of the executive department, a peremptory *mandamus* to an executive officer, must for ever remain inoperative, exhibits, in the clearest light, the incapacity of any court to issue such a writ.

I am aware that those parts of the opinion of Chief Justice Marshall, in the case of *Marbury vs. Madison*, which are quoted at length in the opinion of Judge Cranch, may seem to be repugnant to the conclusion at which I have arrived.

In that case, (1 Cranch, 137,) applications were made in December 1801, by Messrs. Marbury and three other persons, to the Supreme Court of the United States, for a writ to compel the Secretary of the United States, to show cause why a *mandamus* should not issue commanding him to cause to be delivered to them, respectively, their several commissions as justices of the peace in the District of Columbia. The application was founded on the following facts; Mr. Adams, whilst President of the United States, and on the 24th of March 1801, had nominated the applicants to the Senate for the offices of justices of the peace in the District of Columbia; their nominations were confirmed the next day, and commissions were made out, signed by President Adams, sealed, and left in the Department of State; Mr. Jefferson came into office a President the next day, and forbade their delivery, and they were accordingly withheld by Mr. Madison. On the return of the rule to show cause, the counsel for the relators was heard *ex parte*, Mr. Madison not appearing.—The case was disposed of and the application denied, on the ground that the Supreme Court of the United States had no authority to issue a writ of *mandamus*, except in the exercise of its appellate jurisdiction; and that so much of the 13th section of the judiciary act of 1789, as purported to empower that Court to issue writs of *mandamus* to persons holding office under the authority of the United States, in original cases, was unconstitutional and void.

The order of discussion adopted by the Chief Justice, was as follows:

"1. Has the applicant a right to the commission he demands?"  
"2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?"  
"3. If they do afford him a remedy, is it a *mandamus* issuing from this Court?"

These questions opened all the points in the case, and they are accordingly considered at large; but it is obvious, that only the remarks under the third head were necessary to the decision of the case; and that the elaborate reasoning under the first and second heads, including all the passages quoted in the opinion referred to me, was wholly

extra judicial. Every topic embraced under these heads, is therefore, open to discussion, not only in the Supreme Court, but in the inferior courts. The fact that the case was argued only on one side, must also be allowed to diminish, still more, the weight of these parts of the opinion; and then also it must be borne in mind, that general expressions are always to be taken in connection with the particular case in which these expressions are used.

Chief Justice Marshall, himself, has claimed the benefit of this latter rule, in reference even to that part of the opinion in *Marbury vs. Madison*, which explained, under the third head, the very ground on which the case was decided.

In the case of *Cohens vs. the State of Virginia*, (6 Wheaton, 264,) the counsel for the defendant in error quoted, and relied on the same dicta of the Court in this case of *Marbury vs. Madison*. In reply to the argument founded thereon, the Chief Justice observes:

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected but ought not to control the judgment in a subsequent suit where the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

In the case of *Marbury vs. Madison*, the single question before the Court, so far as that case can be applied to his, was, whether the Legislature could give this Court original jurisdiction in a case in which the Constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The Court decided, and we think very properly, that the Legislature could not give original jurisdiction in such a case. But, in the reasoning of the Court in support of this decision, some expressions are used which go far beyond it.

He then explains the particular occasion of the dicta relied on, and the cases to which they were intended to apply, and proceeds as follows:

"Having such cases only in its view, the Court lays down a principle which is generally correct in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principle."

He then states the construction given to the passages quoted, and the argument founded on it, and observes:

"To this construction the Court cannot give assent. The general expressions in the case of *Marbury vs. Madison*, must be understood with the limitations which are given to them in this opinion; limitations which in no degree affect the decision in that case, or the tenor of its reasoning."

If the general expressions contained in the essential parts of the opinion, require to be thus limited, the like caution must be still more necessary, in considering the other parts. On perusing them with care, it will be found that before entering on the discussion of the remedy by *mandamus*, the Chief Justice had decided that the appointments in question became complete by the signing and sealing of the commission; that the applicant had therefore a vested legal right to the office, and to the commission as the evidence of it, of which the Executive cannot deprive him; that the Secretary of State had received the commission from the President for the use of the applicant; and that he had no more right to withhold it than any other person.

His reasoning in support of the remedy by *mandamus* depends entirely on the conclusion previously expressed, that the appointment was complete and the official power and agency of the President and Secretary of State in the matter at an end; and it was precisely on this point that President Jefferson dissented, in such strong terms, from the opinion of the Chief Justice. Speaking of this case, in a letter to Judge Johnson, (Jefferson's Correspondence, vol. 4, p. 372,) he says:

"The commissions were signed and sealed by him (Mr. Adams) but not delivered. I found them on the table of the Department of State, on my entrance into office, and I forbade their delivery. Marbury, named in one of them, applied to the Supreme Court for a *mandamus* to the Secretary of State, (Mr. Madison,) to deliver the commission intended for him. The Court determined at once, that being an original process, they had no cognizance of it, and there the question before them was ended. But the Chief Justice went on to lay down what the law would be had they jurisdiction of the case, to wit: that they should command the delivery. The object was clearly to instruct any other court, having the jurisdiction, what they should do if Marbury should apply to them. Beside the impropriety of this gratuitous interference, could any principle of law be perverted to justify it? For if there is any principle of law never yet contradicted, it is that delivery is one of the essentials to the validity of a deed. Although signed and sealed, yet as long as it remains in the hands of the party himself, it is *in fieri* only; it is not a deed, and can be made so only by its delivery. In the hands of a third person, it is *in esse* only. But if they should command the delivery, the object was clearly to put in the hands of the President, and in the case, was actually in my hands, because when I countermanded them, there was as yet no Secretary of State."

The tone and language of this passage may be regretted; but it shows very plainly, when taken in connection with the opinion, the real point on which the controversy turned.

In this view of the case, it is manifest that the question now presented, to wit: whether a *mandamus* can be issued to the head of an executive department, commanding him to perform an executive act which has not yet been commenced? did not arise. The difference between this question and the question whether Congress can authorize the Judiciary to issue a *mandamus* to an executive officer, to compel the delivery of a paper in his possession, containing the evidence of a past executive act already fully performed, is too obvious to need remark.

The limitations to which the obiter arguments in the case of *Marbury vs. Madison* are thus necessarily subjected, rescue the present case from their influence, and supersede the necessity of a particular examination of any part of them.

There are, however, one or two remarks on the argument of Chief Justice Marshall, which, as they may tend to elucidate the subject, and to prevent misapprehension, ought not to be omitted. He labors to prove that where a vested legal right has been violated by a public officer, or where a specific duty, as assigned by law to an officer, and he refuses to perform it, the individual who considers himself aggrieved has a right to resort to the laws of his country for a remedy, and that the conduct of the officer is liable to be judicially examined. This, if ever doubtful, is now too well settled to be disputed. Actions of trespass, and other actions for damages, against collectors of the customs, officers of the army and navy, and other public functionaries, for official acts or omissions injurious to the vested rights of individuals, are of frequent occurrence; and it is not to be doubted that through such actions, any officer of the Government, the President included, may be held responsible in damages for the violation of any vested legal right. But these actions are against the officer in his individual character, and do not imply any power in the judicial tribunals in which they may be prosecuted, to supervise and control in advance the official action of the officer. Such a power, however, is implied in the jurisdiction by *mandamus*; and its compatibility with the Constitution, when issued to an executive officer, for the purpose of compelling him to perform a specific executive duty, is a point not discussed, nor even touched, in the opinion; probably because it was supposed that if the appointment were regarded as complete, the point could not arise.

This subject was much considered in the year 1808, by one of my predecessors in office. In that year, an application was made by Messrs. Gilchrist and others, to the Circuit Court of the United States for the District of South Carolina, for a rule on the Collector of the port of Charleston, to show cause why a *mandamus* should not issue to him, commanding him to grant clearances for certain ships, detained by the collector, under constructions from the Secretary of the Treasury, given under the embargo acts. The Collector appeared; showed cause by producing the Secretary's instructions, and submitted without argument to the decision of the Court. The judges being of opinion that the instructions were illegal, ordered a *mandamus* to be issued, commanding the Collector to grant clearances as applied for. President Jefferson, on hearing of these proceedings, referred the subject to the Attorney General, Mr. Rodney, who expressed a decided opinion against the power of the Court to issue the writ. After

stating several reasons, growing out of the limited jurisdiction of the courts of the United States, and the peculiar provisions of the law under which the instructions of the Secretary of the Treasury had been issued, he concludes as follows:

"It might perhaps with propriety be added, that there does not appear in the Constitution of the United States anything which favors an indefinite extension of the jurisdiction of Courts over the ministerial officers within the executive department. On the contrary, the careful discrimination which is marked between the several departments, should dictate great circumspection to each, in the exercise of powers having any relation to the other."

The courts are indubitably the source of legal redress for wrongs committed by ministerial officers, none of whom are above the law; and the use to be made of it, it would seem, by legal process in the ordinary way. For there appears to be a material and obvious distinction between a course of proceeding which redresses a wrong committed by an executive officer, and an intervention by a ministerial writ taking the executive authority out of the hands of the President, and prescribing the course which he and the agents of any department must pursue. In one case, the executive is left free to act in his proper sphere, but it is held to strict responsibility; in the other all responsibility is taken away, and he acts agreeably to judicial mandate. Writs of this kind if made applicable to officers indiscriminately, and acts purely ministerial and executive in their nature, would necessarily have the effect of transferring the powers vested in one department to another department. If, in a case like the present, where the law vests a duty and a discretion in an executive officer, a court cannot only administer redress against the misuse of the authority, but previously direct the manner to be made of it, it would seem that under the name of a judicial power, an executive function is necessarily assumed, and that part of the Constitution perhaps defeated, which makes it the duty of the President to take care that the laws be faithfully executed. I do not see any clear limitation to this doctrine, which would prevent the courts from compelling by *mandamus* all the executive officers all subordinate to the President, at least, whether charged with legal duties in the Treasury or other department, to execute the same, according to the opinion of the Judiciary, and contrary to that of the Executive. And it is evident, that the confusion arising will be greatly increased, by the exercise of such a power, by a number of separate courts of legal jurisdiction whose proceedings would have complete and final effect, without an opportunity of control by the Supreme Court. So many branches of the Judiciary, acting within their respective districts, their courses might be different, and different rules of action might be prescribed for the citizens of different States, in the exercise of that power of administration which the Constitution meant to secure, by placing the executive power for them all in the same hand.

What, then, becomes of the responsibility of the Executive to the Court of impeachment and of the nation? Is he to remain responsible for acts done by command of another department? or is the nation to lose the security of that responsibility altogether? From these and other considerations, were this branch of the subject to be pursued, it might be inferred, that the Constitution of the United States, by the distribution of the powers of our Government to different departments, ascribing the executive duties to one, and the judiciary to another, controls any principle of English law, which would authorize the courts to enter into the department of the other, to snail the powers of that other, and to assume the direction of its operations to itself."

This opinion may be found at length in HALL'S American Law Journal, (vol. 1, p. 433,) and at page 440 of the same volume will be found a reply from Judge JOHNSON, who presided in the circuit court when the *mandamus* was issued. This paper embraces a full review of most of the objections of the Attorney General, but it by no means answers the argument just quoted. The submission of the collector and the District Attorney is relied on, as at least excusing the act of the court; and in the case of *McIntyre vs. Wood*, (7 Cranch, 504,) it is expressly admitted by Judge JOHNSON himself that the court had no jurisdiction in the matter, except that derived from the consent of the public officers. This is his language: "A case occurred some years since in the circuit court of South Carolina, the notoriety of which may apologize for making an observation upon it here. It was a *mandamus* to a collector to grant a clearance, and unquestionably could not have been issued but upon a supposition inconsistent with the decision in this case. But that *mandamus* was issued upon the voluntary submission of the collector and the district attorney, and in order to extricate themselves from an embarrassment resulting from conflicting duties. *Volenti non fit injuria*."

As the Charleston case is the only one, prior to the present, in which a writ of *mandamus* has ever been actually issued by any of the courts of the United States to an executive officer, its history and result are interesting; and I am happy to find in them so decisive a corroboration of my own opinions.

5. But the ground is taken, in the opinion of the circuit court, that the relation of the Postmaster General to the President is very different from that of the other heads of Departments.

"They (say the Court) in the very terms by which their offices were created, and their duties defined, are to perform such duties and execute such orders as they shall be required to perform and execute by the President of the U. S. The Postmaster General, however, clearly bears no such relation to the President. We cannot find a word in the law under which he was appointed or in the various laws respecting the Post Office, or in the Constitution, or in the laws of the United States, which intimates any connection between him and the President, or any authority in the President to prescribe his duties, or to control him in the exercise of his official functions."

It is true that he is appointed, and therefore may be removed by the President. But the President, if he has the power to control him, can only do it through his fear of removal. If he should refuse to obey an order by him under that control could be thereby justified. The Postmaster General, in the exercise of the duties of his office, appears to be legally as independent of the President as the President is of him."

It was with great surprise that I perused this part of the opinion. The Constitution assumes that certain executive departments will be created, but does not attempt to enumerate them; nor was any enumeration necessary, because the very nature of the functions assigned to any particular Department, would readily determine its true character. The whole business of the Post Office Department, and all the official duties of the Postmaster General, as its head, are exclusively executive; and if the views of the Constitution above taken be correct, then, whatever may be the language of the acts of Congress respecting the Department, there exists a most intimate connection between the Postmaster General and the President; and the latter has the same control over the exercise of his official functions, when not prescribed by law, and is subject to the same obligation of taking care that all his duties are faithfully performed, which exist in respect to the other heads of Departments.

The passage above quoted is not less repugnant to the practical course of the Government.

One of the first official acts of President WASHINGTON, after entering on the Chief Magistracy, was to call on the then Postmaster General for an account of the state of his office.

"A perfect knowledge" (says his biographer) "of the antecedent state of things being essential to a due administration of the executive department, its attainment engaged the immediate attention of the President; and he required the temporary heads of departments to prepare and lay before him such statements as would inform him of the state of their business."—*Madison's Life of Washington*, vol. II, p. 159.

The form of this requisition will be found in the late collection of his writings (vol. X, p. 11); and it will be seen by the note under the editor, MR. SPARKS, that it was addressed, among others, to BENJAMIN HAZARD, the Postmaster General appointed by the Old Congress.

The first law concerning the Post Office Department, passed after the adoption of the Constitution, was the act "for the temporary establishment of the Post Office," approved September 22, 1789. It consisted of only two sections—the last merely declaring that the law should continue in force until the end of the next session of Congress, and no longer. That section was in the following words:

"Be it enacted, &c. That there shall be appointed a Postmaster General, his powers and salary, and the compensation to the assistant or clerk and deputies which he may appoint, and the regulations of the Post Office shall be the same as they were under the resolutions and ordinances of the late Congress. The Postmaster General to be subject to the direction of the President of the United States in performing the duties of his office, and in forming contracts for the transportation of the mail."

This act was continued in force by the acts of August 4, 1790, March 3, 1791, and February 20, 1792, to the 1st of June 1792, when it gave place to the act of the 20th of February, 1792, "to establish the post office and post roads within the United States," which fully organized the department, and introduced numerous legal provisions for the government of its concerns.

Since 1792, the duties of the Postmaster General have been so far defined by law, as to leave little room for executive discretion; and it was not until 1829, that he was regarded as a member of the President's cabinet. But that his office has always been treated by Congress, as well as by the President, as an executive department, is shown by the act of 1789, which left all its concerns to the direction of the President; by the act of 1792, and all the subsequent laws, which speak of it as a "department;" by the power of appointing postmasters vested by law from 1789 to 1836, in the Postmaster General alone, and still retained by him in all cases where the commissions of the postmaster are under \$1,000—an arrangement palpably unconstitutional, unless the Postmaster General be the head of a department—by the practice of all those who have held the office of President, to require reports from, and to give directions to the Postmaster General; by the placing of the department on the same footing, in respect to salary and organization with the other great executive departments; and finally, by the introduction of its head into the cabinet council of the President.

The relation, then, of the Postmaster General to the President is the same as that of the other heads of departments. This relation does not authorize the President to give any direction to the Postmaster General contrary to the laws concerning the department, but it authorizes and requires him to direct the faithful execution of those laws, and to take care that such directions be followed. And as the only coercive power with which the President is armed by the Constitution is the power of removal, it will be his duty to exercise that power, if he cannot otherwise secure, on the part of the Postmaster General, a faithful execution of the laws. Nor will acts done by the Postmaster General under the President's direction, be invalid, even though the judgment of the former be opposed to the act, and he be induced, through fear of removal, to execute the President's direction. The defectiveness of the motive will not determine the legal character of the act; if it be within the power of the Department, and be conformable to law, it will still be valid. I think, therefore, that this officer is no more subject, in his official action, to the supervision and control of the Judiciary, than the head of any other executive department; and that the principles above stated, if sound in respect to any executive officer, must be admitted, when the subject shall be fully examined, to be equally applicable to him. On the other hand, the claim of judicial power is set up in the present case, in respect to the Postmaster General, involves the like claim over the official action of every other executive department, and therefore brings into discussion one of the most grave and important questions, which has yet arisen in the practical administration of the Government.

I am, sir, very very respectfully,  
Your obedient servant,  
B. F. BUTLER.

HON. AMOS KENDALL,  
Postmaster General of the United States.

**MARLBORO' HOTEL.**  
The subscriber would respectfully give notice that he has taken the MARLBORO' HOTEL, and is now ready to receive his friends. The house has been thoroughly repaired, polished, and newly painted, and papered. The furniture and bedding are new, and the accommodations in every respect are believed to be equal to any other Hotel in the city. No pains will be spared to furnish the table with every variety of the market affords. Efforts will be made to furnish the table with the products of free labor, and provision will also be made for those who prefer vegetable diet. Religious worship will be regularly maintained every day, and as far as possible to prevent, no company be received or bills will be settled on the Sabbath. No smoking allowed. The Hotel will be kept entirely on the Temperance principle, and while not a particle of intoxicating liquor will be sold or used, it will be a quiet house for gentlemen travelling with their families, as well as for others. There are several suits of rooms for the accommodation of small families as permanent boarders. Application for permanent board will be received at the Hotel every day.  
6m N. ROGERS. 1622

**WASHINGTON HOUSE.**  
No. 4 BULLARD STREET, Nantucket, Mass.  
A. BUTLER, Proprietor.  
The subscriber has taken the Washington House, situated on Bullard Street, Nantucket, Mass., and is now ready to receive his friends. The house has been thoroughly repaired, polished, and newly painted, and papered. The furniture and bedding are new, and the accommodations in every respect are believed to be equal to any other Hotel in the city. No pains will be spared to furnish the table with every variety of the market affords. Efforts will be made to furnish the table with the products of free labor, and provision will also be made for those who prefer vegetable diet. Religious worship will be regularly maintained every day, and as far as possible to prevent, no company be received or bills will be settled on the Sabbath. No smoking allowed. The Hotel will be kept entirely on the Temperance principle, and while not a particle of intoxicating liquor will be sold or used, it will be a quiet house for gentlemen travelling with their families, as well as for others. There are several suits of rooms for the accommodation of small families as permanent boarders. Application for permanent board will be received at the Hotel every day.  
3m N. ROGERS. 1622

**WORCESTER HOUSE.**  
The subscriber has taken the Worcester House, situated on Main Street, directly opposite to the Depot of the Boston and Worcester Railroad.  
The establishment contains a great number of public and private parlors, and a reading room—is furnished throughout in elegant style, and provided with every accommodation for travellers, families and parties.  
Meals will be furnished for passengers arriving or departing by the Cars or Stages.  
All stages which leave Worcester, call at the House for passengers.  
The prices have been greatly reduced, and are now put at the most moderate rate.  
N. B.—Stabling and keeping for horses will be furnished.  
LYSANDER C. CLARK, Proprietor.  
Worcester, June 7, 1837. 1622

**MOUNT VERNON HOUSE.**  
(Late Philadelphia Hotel).  
No 95 NORTH SECOND STREET, PHILADELPHIA.  
The subscribers respectfully inform their friends and the public generally, that they have taken the above establishment, which contains one hundred and twenty rooms, they are now prepared to give ample accommodation to all those who are disposed to favor them with their patronage.  
The table will be furnished with the best market afford.  
The Wines and Liquors are, of the best selections.  
The sleeping apartments are airy, well lighted, and comfortably furnished.  
Attentive and experienced waiters are employed, and the proprietors pledge themselves to nothing on their part shall be wanting to render this establishment every way worthy of public patronage.  
FERDINAND ROBERTS, DANIEL MIXER, Proprietors.  
July 10 31aw3m 1622

**NATIONAL HOUSE.**  
Blackstone, corner of Cross Street, Boston.  
The subscriber late of the Yeoman House, would respectfully inform his friends, and the public generally, that he has taken the above House in connection with J. P. JONES, and he is now prepared to give the best services to promote the comfort of visitors.  
The House is spacious and mostly new, containing about sixty apartments, together with a pleasant dining hall and sitting rooms, all of which are newly furnished. The location of the National is pleasant and central, and the subscriber hopes to receive a continuance of that patronage hitherto so liberally bestowed.  
LEVI MOVER, Proprietor.  
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**YEOMAN HOUSE.**  
No 24 Ann St, head of Merchants Row, Boston.  
The subscriber having bought out Mr Levi Mover, of the above house, has now opened the same for the reception of company.  
This House is situated in the most central and business part of the city, is handsomely fitted up for the accommodation of gentlemen, who can be furnished with rooms and board, or board without rooms on the most reasonable terms.  
Gentlemen visiting the city on business are respectfully invited to call.  
The table will be furnished with choice liquors of all kinds.  
The bath will be rendered every exertion and attention to make this House worthy the patronage of his friends and the public, of whom he solicits a share.  
JOHN TILTON, Proprietor.  
1622 1622

**TO LET.**  
Part or the whole of a House containing eight rooms, with a wood shed, yard, and a well watered cistern, with five minutes walk of the Post Office. Inquire at this office.  
1622 1622





